AOWFA 2023: Myths and facts

This fact sheet demystifies key myths and provides facts regarding the American Offshore Worker Fairness Act ("AOWFA") (S. 3038), introduced by Senator Cassidy (R-LA) on October 4, 2023.

While there have been previous versions of AOWFA proposed, this version purports to "level" the playing field" and strike a balance to maximize opportunities for U.S. companies and workers and avoid project delays. OMSA states they are willing to accept this legislation and that the only difference between hiring professional U.S. mariners versus hiring foreign crews is the rate of pay. This is of course far from the truth and as discussed below S. 3038 remains fundamentally flawed and stakeholders should not be confused by erroneous hyperbole from stakeholder advocates.

Fundamentally, similar to the House version of AOWFA, S. 3038 would require foreign flag vessels that are more than 50% foreign owned/controlled to use mariners and industrial workers from: 1). The vessel's flag State or, 2). U.S. citizens or, 3). Aliens lawfully admitted to the U.S. for permanent residence while operating on the U.S. OCS. Additionally, it would limit the number of individuals crewing a vessel that are citizens of the flag State or Green Card Holders to 2.5 times the number of individuals required to crew the vessel, and all foreign seafarers must have a Transportation Worker Identification Card ("TWIC").

However, S. 3038 would also exempt rigs, MODUs, FPSOs, and certain installation vessels performing heavy lifts or lifting certain turbine components. It would also require a survey be made of the domestic cable and pipelay market and allow foreign vessels to perform this work if a coastwise qualified vessel is not available and/or capable of performing this work.

Furthermore, considering the recent announcements by Developers, including Ørsted and Avangrid, to terminate offshore wind projects due to rising costs, permitting frustrations, and supply chain challenges, among many others, now is not the time to consider crewing legislation.

Any version of AWOFA presents unnecessary uncertainty and acutely compounds the existing obstacles that offshore wind developers are currently facing and struggling to overcome and should be rejected.

This version of the document was finalised on December 7, 2023.

© 2023

Myth one – Join the American offshore maritime workforce in support of S. 3038 or admit that there was never any interest to hire Americans in the first place.

Fact – To the contrary, opponents of this legislation support Americans and American workers. IMCA members who are currently performing installation operations off the east coast have made efforts to hire American workers when available and who are competent and fully trained to perform the required functions.

However, offshore construction/installation vessels are extremely specialized vessels that require crew with significant experience and specialized expertise that takes many years to acquire. No one would consider it safe to substitute a commercial airline pilot for an F-15 fighter jet pilot, much less immediately require the pilot and fighter jet to perform a complicated manoeuvre that takes years to safely learn.

Likewise, it is not safe to remove an entire experienced and competent crew from a specialized offshore installation vessel and put on an entirely new crew that has no experience on that vessel type, much less immediately send the new crew and vessel to perform complicated installation operations that require years to master.

Myth two – When the U.S. Coast Guard (USCG) issued certain enacting regulations for OCSLA under their purview, USCG decoupled the citizenship of foreign persons who are permitted to work on the U.S. OCS from the citizenship of the vessel owner.

Fact – This is simply wrong! Congress never intended to require the foreign crew on a foreign flag vessel to be from the vessel's flag State. Congress stated that the crew of foreign flag vessels will be "as established under certification of registry of other nations," meaning that the flag State determines what the manning requirements are to be for their vessels in accordance with their crewing laws. This is consistent with customary international law as reflected in the Law of the Sea Convention (Article 94 under Duties of the flag State to exercise jurisdiction over manning).

The intent of the current exemption under the Outer Continental Shelf Lands Act ("OCSLA") is to protect U.S. citizens from retaliation when working on a U.S.-flag vessel operating on a foreign continental shelf by forcible replacement with foreign citizens from that coastal nation.

Despite the fact that there are a few countries like Brazil that have implemented certain manning provisions requiring varying percentages of local hire or use of local labor union, these exceptions do not make it right. Indeed, enactment of this proposal could result in many additional foreign countries potentially retaliating against U.S. flag vessels working offshore globally.

Myth three – U.S. and Louisiana mariners and maritime companies must be able to compete on a level playing field in the Gulf of Mexico for all offshore energy activities. We cannot continue to lose to foreign vessels who take advantage of loopholes, avoid paying taxes, and hire foreign workers. Foreign vessels are able to leverage these cost savings to undercut the charter rate of similar U.S. flag vessels.

Fact – The whole basis for the above contention is dependent on "fantasy facts." Foreign flag vessels are not competing with U.S. flag vessels based on crew wages or type of vessel. It is well known that the cost of operating a U.S. flag vessel is significantly higher than operating a foreign flag vessel, far more than the difference between the cost of wages for U.S. and foreign crews. The U.S. flag vessel market already has a monopoly on all jobs for Crew Transfer Vessels ("CTVs"), Service Operation Vessels (SOVs") and Offshore Supply Vessels ("OSVs"). Foreign flag vessels simply do not compete in these areas.

It is only when there is no U.S. capability that foreign vessels are used. These foreign flag speciality vessels must first install the foundations and lay the cable and pipe, in a relatively short time-line, to provide the longer term and ongoing jobs and employment for U.S. vessels and their U.S. crews to support and maintain the installations for years after the initial installation work is completed .

Moreover, there simply is no U.S. capability now, or in the foreseeable future, to perform installation (except for one turbine installation vessel being built by Dominion), cable, or pipelaying work. Thus, there is clearly no loophole, no loss of jobs to foreign vessels or workers, and no leveraging of cost savings to undercut charter rates.

Further, there is presently a dire shortage of U.S. mariners and U.S. companies are struggling to man the current U.S. flagged fleet. Many more U.S. mariners will be needed to crew U.S. flag offshore vessels for numerous categories of vessels, such as CTVs, SOVs, and OSVs, to support offshore oil and gas and wind projects, many of which have yet to be built. There is certainly no lack of opportunity in jobs for U.S. mariners presently or in the future. However, legislation that derails and delays the ability of offshore wind development to move forward with installation projects will most certainly harm U.S. mariners by causing the delay or cancellation of building CTVs, SOVs, OSVs and a host of other supporting vessels and jobs that will be needed to support offshore wind development for decades to come.

Myth four – S. 3038 strikes a balance between "providing the fullest possible employment for Americans in OCS activities" and while ensuring the installation of offshore wind turbines and the activities of oil and gas rigs or mobile offshore drilling units are not disrupted.

Fact – No balance is struck here. The proposal attempts to establish a threshold of lifting capability or specified offshore wind components for certain installation work by installation vessels that would not be subject to the crewing requirements. It also tries to exempt certain drilling vessels such as rigs, MODUs from these requirements recognizing that there is no U.S. capability. However, there are many offshore lifting operations conducted by foreign flag speciality vessels that would be subject to the crewing requirements. And, there is simply limited U.S. crane capability to perform any significant lifting work. And, there is no exemption for survey vessels for which there is limited U.S. capability.

The legislation then tries to establish a process after a certain timeframe whereby industry must first survey the domestic market for coastwise qualified pipe and cable lay vessels before using a foreign flag vessel for the work. Again, there is no U.S. capability today, and none forecast for the foreseeable future, for either cable or pipelay vessels. Thus, establishing such a process is not useful and will simply create more delay.

Again, there is no U.S. capability in any of these areas so it makes no sense to try and preserve this type of speciality work for a domestic fleet that simply does not exist today – and may not exist in the future.

Myth five – Requiring foreign seafarers to obtain a TWIC will improve the oversight of foreign flag vessels and crew.

Fact – A TWIC is required by the Maritime Transportation Security Act for workers who need unescorted access to secure areas of the nation's maritime facilities and vessels. This is simply not applicable for operations aboard a foreign flag vessel, which has no secure areas for which a TWIC would be required, when operating on the U.S. OCS.

Every foreign crewman goes through comprehensive security vetting at a U.S. embassy before obtaining a visa, making a second screening unnecessary. In addition, when a foreign vessel arrives on the OCS it must submit a Notice of Arrival report containing detailed information about each crewman to the National Vessel Movement Centre. This information is then shared with the relevant U.S. security

agencies to confirm the individual presents no threat to the U.S. It is clear this system is working as evidenced by the offshore industry's impeccable security record. Including yet another screening that is not needed for operations on the vessel merely adds an unnecessary and duplicative regulatory burden.

Myth six – Flag States have sufficient mariners and specialty technicians to continue to crew offshore vessels.

Fact – There is a limited supply of specialist technicians and mariners globally, and few, if any, are available from the flag States of the speciality vessels that typically perform offshore work. Indeed, in a recent study conducted by IMCA on the flag States typically operating speciality vessels on the U.S. OCS, the majority of these vessels are flagged in such countries as the Bahamas, Isle of Man, Malta, Cyprus, Panama, and Singapore, which have few available mariners and speciality personnel.

As a result, the proposed legislation would essentially require a vessel to replace its entire crew with untrained and inexperienced U.S. mariners, if there are any U.S. mariners available at all. Companies will simply be unable to accept the operational risks to do so and therefore would turn to work elsewhere globally, resulting in a shutdown of offshore energy work in the United States.

Myth seven – Opponents to this legislation are against enhanced enforcement of companies that violate or avoid the offshore crewing exemption law.

Fact – To the contrary, opponents to this legislation agree that the Coast Guard could do a better job at oversight of the exemption process and make improvements with regard to enforcement.

For starters, despite recent action by Congress to make it clear that the crewing exemption law applies to offshore wind, the Coast Guard has not implemented this and a vessel that engages in an offshore wind project does not have to obtain a crewing exemption. The crewing exemption process should apply the same to wind as it does to an oil and gas project.

In addition, an exemption issued today is valid indefinitely until there is a change in ownership or control – relying on self-reporting by the company receiving the exemption. Instead, a company should be required to periodically (e.g. on an annual basis) renew/re-certify it continues to qualify for an exemption.

Furthermore, more offshore boardings of foreign flag vessels would help ensure compliance with the law. The Coast Guard will need additional funding to implement these changes should legislation be enacted to implement these measures.

Myth eight – The current exemption process is flawed because unlimited visas can be issued as visas are not linked to the vessel for which the exemption was Issued.

Fact – There is no valid reason to link a worker's visa to a particular vessel. In fact, there is no requirement under U.S. law to link a B visa to a particular work assignment in the U.S. A B-1 (OCS) visa is a type of business (B) visa. A B-1 visa is issued to foreign visitors participating in business activities of a commercial or professional nature in the United States.

A foreign visitor is typically admitted under a B-1 visa for the period necessary to carry out business activities, typically up to six months which can be extended up to a maximum period of 1 year. While a B-1 (OCS) visa is a type of visa specifically issued to an offshore worker, the B-1 rules discussed above are the same for a B-1(OCS) visa and rightly so.

The Coast Guard exemption letter issued to a vessel serves as proof to an embassy officer that that worker is eligible to initially be issued a B-1 (OCS) visa. Once issued, the visa is valid for use aboard any

vessel that has been issued a valid vessel exemption by the Coast Guard. It would be unlawful for a worker issued a B-1 (OCS) visa to work aboard a vessel that has not been issued a vessel exemption and appropriate enforcement action should be taken if a violation of this requirement is found.

Myth nine – Opponents to this legislation are not willing to work with Congress to advance the Interests of U.S. workers.

Fact – To the contrary, opponents believe Congress is listening to flawed reasoning and assumptions and should instead focus on realistic measures to advance U.S. worker interests and the overall energy development offshore instead of measures that will derail the energy security of the U.S. Specifically, Congress should first assess the domestic workforce. There are numerous credible reports identifying the lack of trained mariners to crew U.S. vessels across all marine industries.

Specifically, an analysis should be carried out by the Coast Guard and some other credible third-party entity and a report should be prepared on the existence today of qualified and available U.S. citizens that could work on these foreign flag specialty vessels and to make recommendations on what is needed to build such a work force in order to carry out difficult offshore work requirements safely.

Concurrently, Congress should focus on establishing priorities and creating incentives including funding to support and enhance U.S. Maritime Centers of Excellence, maritime academies, industry training providers, and labor unions nationwide to address the current U.S. mariner skills and availability shortfall.

In particular, this work should address the issue of crewing the new U.S. market for manning new offshore wind vessels such as for CTVs and SOVs. The U.S. shipbuilding industry is developing these vessels now in hopes of having U.S. mariners to crew them. Their efforts should be supported. And as emphasized, IMCA supports enhancements to the current exemption process and more proactive Coast Guard oversight and enforcement action for violations.

Myth 10 – The U.S. can still meet the Biden Administration's goal of 30 GW of offshore wind with only American workers and American vessels.

Fact – Almost all of the foreign flag speciality vessels must first complete the work to survey, install foundations, topsides, and wind turbines, and lay the cable and pipe before U.S. flag vessels can perform the necessary support work. It would be impossible for the U.S. to meet these goals presently with only American workers and vessels.

The current system has worked well for decades, and it makes no sense to systematically change the fundamental process today which will clearly impede offshore development.

Enactment of this legislation would compound problems for the offshore market, particularly in view of the fact that the domestic fleet does not directly compete with the speciality vessels required to perform this offshore work and the costs and delays to construct offshore wind farms continues to jeopardize the entire market.